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No. 99-1481

In the
**SUPREME COURT OF THE UNITED STATES**

USHA VAKHARIA, M.D.,
*Petitioner*,

v.

SWEDISH COVENANT HOSPITAL, AMERICAN SOCIETY OF ANESTHESIOLOGISTS, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

# REPLY BRIEF FOR WRIT OF CERTIORARI

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## THE RESPONDENTS' "QUESTIONS PRESENTED" AND "STATEMENT OF THE CASE" IS AN ABUSE OF THE RULES OF THIS COURT

Respondents' brief in opposition reflects the central problem of the instant case, a case decided by summary judgment without the benefit of any jury finding. Nearly every statement of alleged fact contained in the respondents "statement of the case" was contested by a specific response and documentary evidence, contesting virtually every assertion (Ap. Br. SA2, SSA1).

The rules of this court do not permit a responding party to present as "the facts" that which it would have a trier of fact believe to be more probably true. Under Rule 14 (g) the petitioner is to set forth the facts "material to consideration of the issues presented for review." The petitioner has done that (Pet. 2-14). This case comes to this court after a summary judgment. After summary judgment a reviewing court is to consider all reasonable facts and inferences in the record most favorable to the non-movant, *Hunt v. Cromartie*, 119 S.Ct. 1545, 1551-2 (1999). Under Rule 15(2), "brief in opposition should address any perceived misstatement of fact...that bears on what issues properly would be before the court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." The respondents have simply ignored that injunction and have presented a statement of the case based on their own affidavits the factual contents of which were hotly contested.

The respondents have seized upon a weakness in the review process which, if the court permits, is subject to exploitation by the unscrupulous. The record on appeal is not submitted with a petition for writ of certiorari. As a consequence neither party is required to back their statements of fact with citations to the record, and the

court relies on their good faith to recite only those which are truthful and relevant. The viciousness of respondents' practice, when this court is inundated with numerous petitions but can take only a small percentage, is unquestionable. The efficacy of this court's review procedure depends on a level of professional integrity wholly lacking on the part of respondents, who have ignored the petitioner's statement while submitting their own spurious statement with citations to the missing record in order to give it an air of verisimilitude. Now the petitioner is faced with a dilemma, does she sit down and go fact by fact to demonstrate where the truth lay? If she does, and this court had the time or patience to wade through the reply, then what the petitioner had to say would itself be unverifiable. Moreover, this court does not sit to resolve issues of fact. These rules have as their purpose the presentation of the case in an orderly manner for reasoned consideration. This smokescreen is an insult to the intelligence of the court and a practice which, if permitted, would serve as an open invitation to defend summary judgments by obfuscation of the issues and creating "facts" not relevant to the issues presented. The respondents have not denied any of the facts as presented by petitioner, and should not be permitted to avoid review by this practice, a tacit admission that the relevant facts would demonstrate the error of the decision.

Similarly under "Questions Presented," a parody of what is called for by Supreme Court Rule 14 (a) is offered by respondents. The very first "question" provided is pure and simple "spin." The peer review committee did not terminate the plaintiff's hospital staff privileges, nor was its decison "based on unrebutted, unbiased, and credible evidence" See the petitioner's statement of the case. The question is not simply whether the "plaintiff failed to present sufficient evidence of pretext" but whether it is a proper summary judgment standard for a federal court to defer to the judgment of a hospital "peer review" commitee when evidence of discrimination and comparative evidence

were excluded. Questions II through V are also similarly presented, voluminous discovery was not allowed, and dispositive motions were not fully briefed; no hearsay, self-interested conclusions, or any unsupported fact assertions were identified by anyone.

## THE FAILURE TO CONSIDER COMPARATIVE EVIDENCE IS CRUCIAL

One of the false facts on which respondents' argument hinges is that the ad hoc committee excluded the issue of discrimination because petitioner did not respond to its request for a statement as to the proper scope of the hearing (Resp. 16). No such finding was made by either court nor given as a basis for ignoring comparative evidence. Moreover, petitioner denied this fact and offered three letters sent to the committee and its attorney (DK#539 p.71) as evidence.

Respondent's statement (Resp. 16) that "nothing precluded Dr. Vakharia or her experts from reviewing *any record of her choosing* (emphasis added) with Dr. Wender (or Dr. Loeber) and taking issue with him at the hearing" is false. Neither Dr. Vakharia nor her expert witnesses, particularly Dr. Floyd Heller, were allowed to see the records of other anesthesiologists to demonstrate the disparity of treatment as well as the falsity of the testimony of Drs. Wender and Loeber (DK#572 pp.131-41). These records were only produced by court order two and a half years after the hearing (DK#202). Once allowed to review these records, Dr. Heller, Associate Professor of Anesthesiology, Rush-Presbyterian St. Luke's Medical Center, repudiated the ASA report, concluded that the medical charts provided to the ASA on the three "senior" (white native-born American) anesthesiologists demonstrated more serious problems with anesthesia care than any of the problems allegedly related to Dr. Vakharia's care, and their charts evidenced many, if not all, of the technical or judgmental errors assigned by

Wender or Loeber to Dr. Vakharia (DK#497). Dr. Vakharia's case is a discrimination case, and the cases which would demonstrate the disparate treatment were not allowed to be obtained or presented.

There was much more. Unquestionably the committee was on notice that Dr. Vakharia asserted that discrimination was the real basis for the charges yet they expressly instructed her not to present any evidence of discrimination or to question any witness on the work of other physicians (DK#572 p.131-41). As this court said in *Harte Hanke Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989), a libel case, "Although failure to investigate will not alone support a finding of actual malice (citation), the purposeful avoidance of the truth is a different category."

The respondents argue that the Court of Appeals analysis is not in conflict with *Bolt v. Halifax Hospital Medical Center,* 891 F.2d 810 (11 th Cir.), *cert. denied* , 495 U.S. 924 (1990); *Miller v. Indiana Hospital*, 843 F.2d 139 (3rd Cir., 1988), *cert. denied,* 488 U.S. 87 (1990) and *Brown v. Presbyterian Health Care Service*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied,* 520 U.S. 1181 (1997) as there was no evidence of dishonesty, including direct financial conflicts of interest among members of the peer review committee (Resp. 19). This distinction does not exist. In this case, three witnesses testified *at the hearing* that the main witnesses of respondents, Drs. Wender and Loeber, were lying to the committee. Speaking of Wender's conclusions, Dr. Heller testified *at the hearing* that he "became very suspicious because I don't know how he could glean from those records and arrive at those opinions when you just look at the charts and the medical records" (DK#572 pp.2524-25); he noted the "inconsistencies of Dr. Wender" (DK#572 p.2556); he felt that "the peculiar statements he made were prejudicial in nature and not substantiated in the literature or in the cases that I witnessed." (DK#572 p.2551). He testified that Dr.

Wender's testimony regarding failed regional anesthesia was so insupportable that Wender would never have been able to get it past a panel of anesthesiologists (DK# 572 pp.2575-77; DK# 578 pp.169-70, 294-95).

Dr. Heller compared the testimony of Dr. Loeber to the medical records, and his affidavit stated (DK# 497)

> 22. Attached hereto as Group Exhibit A are listings of statements made by Dr. Loeber regarding the condition and treatment of these patients which are contradicted by the medical records pertaining to the patients involved.
>
> 23. The foregoing matters would not involve matters of medical judgment but are matters of fact.
>
> 24. The significance of virtually all of the entries in the medical records would be understandable to any physician who is in practice and who is attempitng to understand them with reasonable diligence.
>
> 32. ...After listening to Dr. Wender's testimony and the Committee's conduct at the time, and on March 8, 1990, when I testified, I had concluded that the hearing was merely a sham and that any futher testimony from me or anyone else would not in any way affect the predetermined result...

Dr. James O'Brien, Chief of Anesthesiology at Central Du Page Hospital, testified *at the hearing* that in her written comments, Dr. Loeber made "several rather dogmatic statements that are basically not true" (DK#572 p.2678); "no basis in reality" (DK#572 p.2641); "had no basis in fact" (DK#572 p.2647) and another charge was "baseless" (DK#572 p.2659). Dr. O'Brien testified that Dr. Wender's testimony had been given as if he had not read the charts but simply relied on the case summaries supplied by the hospital (DK#572 pp.2677-787, 2718). Despite such

testimony, while the committee was willing to allow the hospital witneses to offer perfunctory conclusions as to the care rendered by the "seniors" (white native-born anesthesiologists) without any supporting facts or medical records, it was unwilling to allow comparative testimony from Dr. Vakharia or her experts (DK#572, p. 186, 198, 202, 227, 233, 258, 263, 309, 313, 326, 357-58, 1167).

Two of the committee members were physicians in a case with complications and in which their own care was subject to question. One of these doctors also cut a patient's ureters in a case offered by the hospital to show the petitioner's charting problems. The fee statements of the hearing officer obtained after the case was filed showed *ex parte* conferences with the hospital attorneys during the period in which the hearing was held as well as the preparation of the final report and the committee members testified that they had no input into the preparation of the report (DK#584, SCF 4300, 4298, 4294, 4291, 4288, 4285). This makes the proceedings presumptively unfair, *Walker v. City of Berkeley,* 951 F.2d 182, 184 (9th Cir. 1991).

Another proffered distinction by respondents is that because *Miller*, *Bolt* and *Brown* are anti-trust cases, not employment discrimination cases, they cannot present a conflict (Resp. 18-19). This suggested rationale is another reason for this court to take this case. This distinction is not valid because at the very heart of a discrimination case is comparative evidence. Respondents' argument should be resolved by this court so that the lower courts, in dealing with discrimination cases, will have precedential guidance on this issue. The argument, now advanced in this case for the very first time (Resp. 19), that the hospital is immune under the Health Care Quality Improvement Act, 42 U.S. C. Secs. 11111(a) and 11112(a) is for that very reason not permissible.

Another false factual statement is offered, namely that "Dr. Vakharia and her expert sandbagged the

Committee and the Hospital by refusing to addess her cases at all" (Resp. 16). Petitioner will not rest by simply stating that she had no obligation to demonstrate the lack of *bona fides* to the committee. *Miller*, 891 F.2d at 144, *Bolt*, 891 F2d at 817, 820, and *Brown*, 101F.3d at 1333-34 held that testimony, including that of a physician, bearing on the good faith of the hearing given subsequent to that hearing is not a bar to presentation in the subsequent case. Not only did seventeen physicians at the hospital testify that they would have no hesitancy in Dr. Vakharia treating themselves or their families,[1] but two expert witnesses, Drs. Heller and O'Brien tesified that Dr. Vakharia met the applicable standard of care and with respect to specific cases pointed out where Dr. Wender and Dr. Loeber had made false charges (DK#572 pp.1998-99, 2009, 2503-92, 2600-01, 2604, 2605, 2607, 2661, 2675, 2677). So also did Dr. Nennhaus (DK# 572 p.1986). The petitioner herself submitted a written case-by-case analysis refuting all of Dr. Loeber's and Dr. Wender's complaints with citations to medical literature and standards in support. (DK#503 ex.41A/41B). The assertion (Resp. 18) that Dr. Heller declined the committee's invitation to return for another day of testimony is another distortion of the record. The committee gave plaintiff 3 1/2 days to present her case in March 1990, Dr. Heller appeared on one of those days, testified until 5:00 p.m. and was willing to continue into the evening but the committee decided to adjourn. The committee gave him two days on which he could appear, but because of his own work, he could not return on those days (DK#497 p. 33). The petitioner asked on a number of occasions for an extension of the hearings and was refused (DK#503 ex.42).

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[1]DK #572 pp. 1841, 1844, 1855, 1875, 1877, 1882,, 1895, 192, 190, 1921, 1930, 1934, 1986, 2005, 2008, 2121, 2151, 2164, 2204, 2206, 2210, 2211, 2214, 2221, 2248, 2249, 2250, 2258, 2272, 2297, 2299, 2320, 2321, 2322, 2329, 2349, 2354, 2389, 2409, 2436, 2488, and 2511

## THE WITNESSES WHO WERE NOT ALLOWED TO BE DEPOSED WERE CENTRAL TO THE ISSUE OF GOOD FAITH

As set forth on page 8 of petitioner's statement of the case, the medical records section of that report was of critical importance, and the testimony of Drs. Wender and Blancato indicated that they, the purported investigators, did not write this portion of the report (DK#539, p.178). The complaint alleged a conspiracy between the ASA and the hospital to eliminate foreign-born medical graduates from the hospital staff through a sham peer review. The petitioner sought to depose two ASA personnel, Dr. Charles Vacanti and attorney Michael Scott, persons who would have drafted the report even though they had not reviewed any medical records. While the court has discretion to control discovery, the court's denial of leave to take the depositions of Dr. Vacanti and Mr. Scott on the basis that they "were largely irrelevant to the issues in this litigation" is an abuse of that discretion, particularly when the court enters summary judgment thereafter with the issues as set forth in the complaint.

## THE FAILURE TO CREDIT PETITIONER'S 12M STATEMENT GOES BEYOND APPLICATION OF LOCAL RULES

Respondents' assertion that the petitioner had failed to challenge the "finding" of Judge Moran that her 566 paragraph 12M statement was "replete with hearsay, self-interested conclusions and unsupported fact assertions," is simply false. As noted by petitioner (Pet. App. 20), the respondents failed to respond even by way of objection to this 12M statement. This statement was used not only in connection with the respondent's moton for summary judgment but petitioner's motion for summary judgment. Assuming *arguendo* that some paragraphs had hearsay or self-serving statements, if something which is hearsay or a self-interested conclusion is not objected to, it

is deemed admitted. The court did not specify any facts which it felt were proper assertions and which were not. The petitioner cited where in the record each fact was derived. Local Rule 12N is an extension of Federal Rule of Civil Procedure 56(e) which requires a specific factual response by affidavit or other proof.

## THE PROPRIETY OF ALEXANDER WAS RAISED

The petitioner brought the issue of the propriety of *Alexander v. Rush North Shore Medical Center,* 101F.3d 487 (7th Cir., 1996), *cert. denied,* 522 U.S. 811 (1997) in light of the language of Title VII and the ADEA as well as this court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) to attention to the trial court and the Court of Appeals. For example, quoting from petitioner's appellate brief dealing with *Alexander*, p. 17, "Title VII and the ADEA apply not only to 'employees' but also 'applicants for employment' and likewise forbid retaliation against 'applicants for employment' 42 U.S.C. Sec. 2000e-3(a) and 29 U.S.C. Sec, 623(d); *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997)." Respondents reliance on *Nationwide Mutual Ins. Co. v. Darden* , 503 U.S. 318 (1992) is misplaced. *Darden* is an ERISA case, and this court has expressly stated that "examples of non-Title VII cases using the term 'employee' to refer to a former employee are largely irrelevant, except to the extent they rebut a claim that the term 'employee' has some intrinsically plain meaning," *Robinson, Id.* at 344. The Court of Appeals' analysis under Section 1981 was flawed by its decision that its "inquiry was necessarily limited to the evidence that the committee actually had at its disposal."

Respectfully submitted,

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